IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1217

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Cross-Petitioners,

v.

HENRY A. KISSINGER,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Miscellaneous: Page(s)

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The Reporters Committee for Freedom of the Press and eleven other professional organizations and writers respectfully cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1]

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[1]In addition to the Reporters Committee, cross-petitioners include the American Historical Association, the American Political Science Association, Professors William Leuchtenburg, Clement Vose, James MacGregor Burns, Arthur Link, Austin Ranney and Donald Herzberg, and columnists William Safire, Nat Hentoff and J. Anthony Lukas.

OPINIONS BELOW

The *per curiam* Judgment of the Court of Appeals for the District of Columbia Circuit and accompanying Memorandum are reproduced in the Appendix to Mr. Kissinger's Petition for a Writ of Certiorari ("Pet. App.") at 47a-50a. The Opinion of the District Court for the District of Columbia is reported at 442 F. Supp. 383 and, along with the District Court's Order of January 25, 1978, is reproduced at Pet. App. 51a-62a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1978. On January 8, 1979, Mr. Henry Kissinger, the appellant in the Court of Appeals and a defendant in the District Court, petitioned for a writ of certiorari to review the portion of the Court of Appeals' judgment that was adverse to him. This cross-petition, which seeks review of the portion of the Court of Appeals' judgment that was unfavorable to the Reporters Committee, invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When the Assistant to the President for National Security Affairs relocated transcripts of his official telephone conversations to the State Department upon becoming Secretary of State and the President made no effort to exercise control over those transcripts after their relocation, did the court below err in determining that the transcripts are nevertheless records of the White House Office of the President which are exempt from the Freedom of Information Act?

2. Are portions of the transcripts which relate to the affairs of the National Security Council in any event subject to disclosure under the Freedom of Information Act in a suit against the State Department where the Council is part of the Executive Office of the President and the Depart-

ment was the last agency with physical custody over the transcripts?

STATUTES

Relevant portions of the Freedom of Information Act, 5 U.S.C. § 552, are reproduced at Pet. App. 1a-11a.

STATEMENT OF THE CASE

The background and development of this case are described fully in the brief which cross-petitioners have filed in opposition to Mr. Kissinger's petition for a writ of certiorari in No. 78-1088. The facts which are relevant to this cross-petition are presented below.

From January 20, 1969 until September 22, 1973, Henry A. Kissinger was Special Assistant to the President for National Security Affairs. In this capacity, he was the ranking official of the National Security Council ("NSC"). From September 22, 1973 until November 3, 1975, Mr. Kissinger held the dual positions of Assistant to the President and Secretary of State. Thereafter, he served solely as Secretary of State until January 20, 1977. Pet. App. 42a.

Throughout this eight-year period, Mr. Kissinger's secretaries recorded his telephone conversations either by shorthand or on tape. Detailed, often verbatim transcripts of those conversations were then prepared for the use of Mr. Kissinger and his aides. Pet. App. 52a. The purpose of this procedure was to assist Mr. Kissinger in performing his governmental duties. As Mr. Kissinger has acknowledged, the notes were "prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted." Joint Appendix ("JA") filed in the Court of Appeals, 47.[2]

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[2] A fuller description of the preparation and uses of the notes may be found in Mr. Kissinger's affidavit, reproduced at Pet. App. 73a-85a and in the opinion of the District Court, Pet. App. 51a-58a.

When Mr. Kissinger moved from the White House to the State Department, the notes of his telephone conversations as a Presidential Assistant were relocated in Department files where, over time, they were intermingled with the notes of Mr. Kissinger's telephone conversations as Secretary of State. JA 157. In October, 1976, as he prepared to leave government service, Mr. Kissinger removed all the notes of his telephone conversations from the State Department to the late Nelson Rockefeller's New York estate. Pet. App. 76a-77a. Several weeks later, Mr. Kissinger entered into an agreement "donating" all the notes to the Library of Congress. The agreement places severe restrictions on public access to the notes while assuring their continued availability to Mr. Kissinger. JA 55-61. The notes were delivered to the Library pursuant to this agreement on December 28, 1976. Pet. App. 78a.

On January 13, 1977, eleven of the cross-petitioners asked the State Department to disclose the notes under the Freedom of Information Act ("FOIA"). This request explicitly encompassed the notes of Mr. Kissinger's conversations as both Assistant to the President and Secretary of State. JA 71-74. After the request was denied on January 28, 1977, cross-petitioners filed suit against the Department, the Library, and Mr. Kissinger in the District Court for the District of Columbia. Their complaint, which also encompassed both the White House and State Department notes, sought an order requiring the return of the notes to the Department for review and disclosure in accordance with the FOIA.

On December 8, 1977, the District Court (the Honorable John Lewis Smith, Jr.) ruled on the parties' cross-motions for summary judgment. Emphasizing that the notes recorded official conversations, were used for official purposes, and were prepared using governmental resources, the court held that they were "property of the United States" and had been "wrongfully removed" from governmental

custody by Mr. Kissinger. Pet. App. 58a. Based on this holding, the District Court determined that the portions of the notes which recorded Mr. Kissinger's conversations as Secretary of State had to be returned to the Department for review and possible disclosure under the FOIA. *Id.* Nevertheless, the court declined to grant any relief in connection with the portions of the notes which recorded Mr. Kissinger's conversations as Assistant to the President. Referring to these notes only briefly, the court commented — mistakenly it turned out — that cross-petitioners had withdrawn their claim to them at oral argument. Pet. App. 55a. Cross-petitioners subsequently sought reconsideration of this portion of the court's Opinion on the ground that, according to the transcript, Judge Smith's recollection of oral argument was inaccurate. Nevertheless, in its Order of January 25, 1978, the lower court reaffirmed its refusal to grant any relief in connection with the White House notes. Pet. App. 60a.

On appeal, the Court of Appeals for the District of Columbia Circuit upheld this aspect of the District Court's decision. Acknowledging that the District Court may have misconstrued cross-petitioners' position regarding the White House notes, it nevertheless determined that the result reached by the District Court was correct. Pet. App. 49a. Three considerations, it indicated, supported this conclusion: (1) the FOIA does not cover those Presidential advisers "who are so close to him as to be within the White House"; (2) the relocation of the notes to the State Department was insufficient to bring them within the Department's disclosure responsibilities under the FOIA; and (3) the fact that portions of the notes reflect the affairs of the NSC, an agency to which the FOIA does apply, provided no basis for disclosure in the absence of an FOIA request directed to that agency. Pet. App. 49a-50a.

REASONS FOR GRANTING THE WRIT

In all important respects, the notes that originated when Mr. Kissinger was Secretary of State are identical to the notes of his telephone conversations as Assistant to the President. Both sets of notes record the transaction of official business, were used to assist Mr. Kissinger in discharging his governmental duties, and were prepared by government employees and stored on government premises. Moreover, when Mr. Kissinger retired, both sets of notes were removed from government custody and "donated" to the Library of Congress on the erroneous theory that they were Mr. Kissinger's personal property and, in each instance, the procedures prescribed by Congress for disposing of official records were ignored. Because of these considerations, the lower courts held that the State Department notes were official records that Mr. Kissinger had unlawfully removed from Department custody; this conclusion would have been equally proper for the White House notes as well.

The Court of Appeals nevertheless refused to require the return of the White House notes to Executive Branch custody for review and disclosure under the FOIA on the ground that (1) Mr. Kissinger's status as a presidential advisor rendered these notes exempt from the FOIA, and (2) even if portions of the notes relating to Mr. Kissinger's NSC duties were subject to the FOIA, cross-petitioners could not qualify for relief because they had never made an FOIA request to that agency. Both of these determinations are in conflict with the objectives of the FOIA and other decisions of the lower courts. Because they raise important and far-reaching issues concerning the proper implementation of the FOIA, these determinations should be reviewed by this Court.

1. The term "agency" in the FOIA has never specifically excluded the Presidency. However, in *Soucie v. David*, 448

F.2d 1067, 1074 (D.C. Cir. 1971), the Court of Appeals for the District of Columbia Circuit held that the Presidency should be considered two entities for FOIA purposes: the Executive Office of the President, which includes those formal executive agencies which report to the President, and the White House Office of the President, which includes the President himself and the immediate aides who advise him. The court determined that the Executive Office was covered by the FOIA, but implied that the White House Office was not. 448 F.2d at 1075.

The 1974 amendments to the FOIA specifically provide that the Executive Office of the President is an "agency" to which the Act applies. *See* 5 U.S.C. § 552(e). While the statutory text is silent on the status of the White House Office, the Conference Report for the 1974 amendments indicates that the term "agency" does not include "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Rep. No. 93-1380, 93rd Cong., 2d Sess. 15 (1974). Based on this legislative history, the District Court for the District of Columbia has held that the FOIA does not apply to the White House Office of the President. *Nixon v. Sampson*, 389 F. Supp. 107, 147 (D.D.C. 1975).

This case, however, does not involve records of a presidential advisor which were retained in the White House for the immediate use of the President and his aides. When Mr. Kissinger resigned as Assistant to the President and became Secretary of State, the notes were moved from the White House to the Department and, thereafter, were filed in Mr. Kissinger's Department office. Moreover, after the notes were transferred, the White House imposed no restrictions on their use and never indicated that it expected the notes to be returned. In short, any interest that the White House might have asserted in the notes was surrendered when the notes left White House custody, and

control over their use and disposition effectively passed to the Department of State.

While the 1974 amendments to the FOIA were under consideration by Congress, the Department of Justice argued that the White House Office should be exempt from the Act because its employees "are among a President's most trusted advisors and the need for those persons to speak candidly on highly confidential matters is obvious." H.R. Rep. No. 93-876, 93rd Cong., 2d Sess. 20 (1974). This rationale has no application to documents which originated in the White House Office but were later circulated to other agencies in the routine course of government business without any effort by the President to exercise continuing control or maintain their confidentiality. Under such circumstances, the justification for exempting records generated by the White House Office from the FOIA is no longer relevant, and those documents should be treated like the records of any other federal agency to which the FOIA applies.

A similar analysis was followed by the Court of Appeals for the District of Columbia Circuit in *Goland* v. *CIA*, ____ F.2d ____, No. 76-0166 (May 23, 1978), which involved an FOIA request for the transcript of a House of Representatives committee hearing that had been loaned to the CIA. The court determined that the transcript remained a Congressional record exempt from the FOIA because of the elaborate precautions that the committee had taken to assure that its hearings were conducted in secrecy and the transcript remained confidential. Slip Op., 12. As the court concluded, the transcript remained "under the control of and continues to be the property of the House of Representatives." *Id.*, 12-13. The court elaborated on this conclusion by explaining:

> "We base our conclusion both on the circumstances attending the document's generation and the conditions attached to its possession by

> the CIA. The facts that the Committee met in executive session and that the Transcript was denominated "Secret" plainly evidence a Congressional intent to maintain Congressional control over the document's confidentiality. The fact that the CIA retains the Transcript solely for internal reference purposes indicates that the document is in no meaningful sense the property of the CIA: the Agency is not free to dispose of the Transcript as it wills, but holds the document, as it were, as a 'trustee' for Congress." *Id.* at 13.

The court cautioned that it reached this result only because "Congress' intent to retain control of the document is clear" and stressed that "[o]ther cases will arise where this intent is less clear." *Id.*, at 14.

Here, in contrast to *Goland*, there is no evidence that the White House exercised any control over the notes of Mr. Kissinger's conversations after they were relocated to the Department of State. In the absence of that control, it must be presumed that the White House abandoned any desire to protect their confidentiality and, thus, that the Department became free to use the notes as it saw fit.

It is no answer to this change in the notes' status to argue, as Mr. Kissinger did in the courts below, that the State Department never acquired "custody" of the notes because they were kept in his "personal" files. If the notes had no connection with Mr. Kissinger's duties as Secretary of State, it would have been unnecessary to store them on Department premises; they would have been left at the White House or removed from government custody altogether. Moreover, Mr. Kissinger has consistently conceded that the notes were used by his Department aides for a variety of job-related purposes (Pet. App. 73a-74a), and it is logical to conclude that this examination included the White House notes as well as the notes generated by Mr. Kissinger at the State Department. Indeed, at the direction

of the Department's Legal Adviser, extracts were prepared upon Mr. Kissinger's retirement not merely of the notes from his State Department period, but of the notes from his White House period as well. This extracting process was conducted by the Undersecretary of State for Management and purported to be based on requirements imposed by Department regulations. JA 264.

In view of the White House's failure to assert any control over their use, the Department's custody of the notes effectively transformed them into State Department "records". To accord the notes a blanket exemption from the FOIA under such circumstances is thus tantamount to holding that any document prepared in the White House Office is immune from FOIA disclosure no matter how widely it is later disseminated throughout the government. Since it is normal government practice for working files to be transferred from one government agency to another, and since documents generated in the White House often have an important impact on the policies of the agencies which receive them, such a holding could seriously erode the disclosure obligations created by the FOIA. For this reason, the decision of the lower court sets a disturbing precedent for future implementation of the FOIA which should be reexamined by this Court.

2. In *Soucie v. David, supra,* the Court of Appeals held that the FOIA applied to the Office of Science and Technology because it was part of the Executive Office of the President. 448 F.2d at 1075. The court suggested that the National Security Council had a similar status, *id.*, at 1074, a view that this Court seemed to share in *EPA v. Mink*, 410 U.S. 73 (1973), where the FOIA was applied to a report prepared by the National Security Council system. The 1974 amendments to the FOIA explicitly define "agency" to include the Executive Office of the President, *see* 5 U.S.C. § 552(e), and the legislative history of these

amendments cites the NSC as an executive agency to which the Act applies. H.R. Rep. No. 93-876, *supra*, at 8.

Cross-petitioners demonstrated in the district court that, during his tenure as Special Assistant to the President for National Security Affairs, Mr. Kissinger was the NSC's chief executive, charged with overseeing the activities of the Council's many standing committees and its staff of experts in national defense and foreign relations.[3] Moreover, as the many published accounts of Mr. Kissinger's White House years indicate, he was an unusually active NSC head, devoting considerable time and energy to directing the policy deliberations of the Council's staff and standing comittees.[4] Accordingly, a sizeable portion of the notes of Mr. Kissinger's White House conversations necessarily relate to the affairs of the NSC, and, at a minimum, these notes are covered by the FOIA.

The Court of Appeals, however, held that cross-petitioners had not qualified for disclosure of NSC-related notes because they had never filed an FOIA request with the NSC. In effect, the court determined that, whenever documents generated by one agency are in the physical custody of another, FOIA requests can only be directed to the originating agency. This approach is not only illogical, it conflicts with both the text of the FOIA and other decisions of the lower courts implementing the Act.

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[3]For example, the editions of the United States Government Organization Manual published by the Office of the Federal Register from 1969 through 1976 specifically designate Mr. Kissinger as the ranking staff official of the NSC. Pertinent pages of these volumes and other materials describing the organization of the NSC staff appear as exhibits to the Reply Memorandum of Points and Authorities In Support of Plaintiffs' Motion for Clarification and Proposed Order, filed in the district court on January 9, 1978.

[4]*See, e.g.*, Marvin and Bernard Kalb, *Kissinger* (1974) and David Landau, *Kissinger: The Uses of Power* (1974).

5 U.S.C. § 552(a)(3) provides that "*each* agency, upon *any* request for records which reasonably describes such records . . . *shall* make the records promptly available to any person" (emphasis added). This provision contains no exemption for records which one agency has acquired from another; rather, it applies to *all* records in the agency's custody regardless of their source. Moreover, 5 U.S.C. § 552(a)(6)(B)(iii) provides that the deadline for answering FOIA requests may be extended for 10 days to permit consultation "with another agency having a substantial interest in the determination of the request . . ." Underlying this provision is an expectation that the agency with physical custody of requested documents would have primary responsibility for disclosing them under the FOIA and, where necessary, the originating agency would participate by offering advice and guidance. Indeed, any other procedure would be grossly inefficient. The FOIA requester who had the misfortune to seek records originated elsewhere in the government would be forced to file an additional request with the originating agency, which would then have to reclaim possession of the documents before the request could be acted upon.

Other decisions of the lower courts have sensibly rejected the approach of the Court of Appeals. *Tax Reform Research Group v. IRS*, 419 F. Supp. 415 (D.D.C. 1976) involved documents originated at the White House and later provided to the IRS by the Department of Justice. In holding that the IRS was required to disclose these documents, the district court pointed out that federal agencies routinely exchange records and the FOIA should therefore be construed so that a request for disclosure may be directed to the last agency where such records are kept:

> "Nor is it decisive that the documents were generated by the White House rather than the IRS. Agencies often utilize or receive copies of documents generated in other agencies, and such

> documents, if identifiable, are clearly agency records for the purposes of the Act. Indeed the Act itself makes provision for this situation. Section 552(a)(6)(B)(iii) allows for a short extension of the Act's time provisions (in responding to a request) in a case where the agency must consult with another agency having a substantial interest in the determination of the request." 419 F. Supp. at 425.

To deny an FOIA request merely because records were originated at some other agency, the court determined, would frustrate the objectives of the Act:

> "To hold that a document received by an agency and actually used by it in agency decision-making is not an agency record for purposes of the Act simply because the document was not generated by that agency or because the decision was on a peripheral matter would seriously undermine one of the central purposes of the Act: to allow the public to become informed on the bases for agency decisions and actions. Such a holding would contradict the mandates of Congress that documents be disclosed unless specifically exempt and that the balance should be tipped in favor of disclosure in questionable situations." *Id.*

Embodying the same basic principle is *Nixon v. Sampson, supra.* In that case, the district court held that records of other federal agencies that, in the course of government business, had been transferred to the Office of the President could be obtained by an FOIA request directed to the President and, thus, an FOIA request to the originating agencies was unnecessary. 389 F. Supp. at 145-146.

Applied in this case, the principles underlying these decisions compel the conclusion that, once they were transferred to the State Department, the portions of the notes

relating to Mr. Kissinger's NSC duties fell within the Department's disclosure responsibilities under the FOIA and a separate FOIA request to the NSC was unnecessary. The contrary holding of the Court of Appeals is illogical and unwise and should not be allowed to stand by this Court.

CONCLUSION

A writ of certiorari should issue to review the portion of the Court of Appeals' decision which affirms the district court's denial of relief in connection with the notes of Mr. Kissinger's telephone conversations as Assistant to the President.

Respectfully submitted,

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